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Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1989

ROY HERBERGER, TRUSTEE FOR THE LEE OPTICAL
AND ASSOCIATED COMPANIES PENSION PLAN TRUST,
Petitioner,

vs.

THEODORE SHANBAUM,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTION PRESENTED FOR REVIEW

Whether the anti-alienation provision of the Employee Retirement Income Security Act precludes the trustees of a plan from offsetting against a participant's pension benefits a judgment based upon that participant's breaches of fiduciary duties to the same plan.



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No. _____

IN THE
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ROY HERBERGER, TRUSTEE FOR THE LEE
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REPORTS OF DECISIONS DELIVERED BELOW

Herberger v. Shanbaum, 897 F.2d 801 (5th Cir.
1990)

Herberger v. Shanbaum, Case No. CA3-88-2984-F (N.D.
Tex. May 1, 1989)

JURISDICTION

Petitioner seeks review of a decision of the United States Court of Appeals for the Fifth Circuit dated April 5, 1990, and entered that same date. App., A1. The mandate was stayed through June 2, 1990. No rehearing or extension of time within which to file this Petition has been sought. Jurisdiction is based upon 28 U.S.C. section 1254(1).

**PERTINENT CONSTITUTIONAL PROVISIONS,
STATUTES AND REGULATIONS**

This case involves the following statutes:

29 U.S.C. §1109(a):

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. §1056(d)(1):

Each pension plan shall provide that benefits provided under the plan shall not be assigned or alienated.

29 U.S.C. §1132(a):

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

STATEMENT OF THE CASE

Respondent Theodore Shanbaum was one of three principal shareholders of Lee Optical, Inc. and a trustee of the Lee Optical and Associated Companies Pension Plan Trust (the "Plan"). Shanbaum is also a beneficiary of the Plan, and is currently drawing a monthly pension of \$3,521.87.

In 1980, the United States Department of Labor ("DOL") commenced an action against Shanbaum and others alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. sections 1001 *et seq.* Specifically, the DOL alleged that Shanbaum and the others had breached their fiduciary duties towards the Plan in violation of 29 U.S.C. section 1109(a). That action was settled under a consent decree that removed Shanbaum as a trustee and also held him liable to the Plan for over \$1,000,000.

A subsequent Plan trustee, Oscar Lindemann, accepted certain assets in full satisfaction of the judgment against Shanbaum. When it was learned that those assets were worth far less than the judgment, the DOL brought an action against Lindemann, Shanbaum, and others, including Henry Klepak. Klepak was an attorney who had represented Lee Optical, Inc., the Plan, and Shanbaum during the relevant time period.

Lindemann was eventually found liable for \$2,000,000 for breaches of his fiduciary duties to the Plan. Shanbaum and Klepak were held jointly liable for the judgment as "knowing and active participants" in Lindemann's breaches of fiduciary duties. Shanbaum did not appeal this judgment. Klepak and Lindemann did appeal, and the Fifth Circuit modified the judgment

obtained by the DOL. *Whitfield v. Lindemann*, 853 F.2d 1298, 1302 (5th Cir. 1988), *cert. denied sub nom., Klepak v. Dole*, 109 S. Ct. 2428 (1989).

Shanbaum was receiving pension benefits under the Plan when this second judgment was entered against him. The United States District Court for the Northern District of Texas permitted the Plan to offset the judgment against Shanbaum's benefits, but the Fifth Circuit reversed. *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988). That court held that the Plan could not offset the judgment because it had not been premised upon Shanbaum's own breaches of fiduciary duties while a trustee. It concluded that Shanbaum's knowing participation in a breach by a successor trustee was insufficient to warrant offset.

While that action was pending, the Plan, Shanbaum, and another trustee were defendants in yet another lawsuit, for unpaid bonuses, brought by a former employee of a liquidated corporation in which the Plan was a shareholder. The Plan asserted a cross-claim against Shanbaum and ultimately won a \$20,000 judgment against him "for the breach of his fiduciary duty as trustee" of the Plan. Unable to collect this judgment through other means, the Plan sought an order from the United States District Court for the Northern District of Texas to allow it to offset the amount against Shanbaum's monthly pension benefits. Jurisdiction was proper in the District Court due to the existence of a federal question under 29 U.S.C. section 1132(a)(3).

The District Court allowed the offset, and Shanbaum appealed. On April 5, 1990, the Fifth Circuit reversed, holding that ERISA's anti-alienation provision, 29 U.S.C. section 1056(d)(1), precluded offset under any circumstances.

The Fifth Circuit's opinion creates a direct conflict between ERISA's enforcement provisions, which grant broad powers to fashion relief against corrupt trustees, and its anti-alienation provision, which protects pension benefits from judgment creditors, a question this Court expressly reserved in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680, 685 (1990). As a result of the Fifth Circuit's over-extension of ERISA's anti-alienation provision, the Plan currently has a judgment against Shanbaum based upon his breaches of his fiduciary duties to it, but cannot satisfy that judgment or offset it against the generous benefits it is currently paying him, all at the expense of the participants and beneficiaries whose trust he betrayed.

REASONS WHY THE WRIT SHOULD ISSUE

THE TRUSTEES OF AN ERISA PLAN MAY OFFSET A JUDGMENT BASED UPON A PARTICIPANT'S BREACHES OF FIDUCIARY DUTIES TO THE SAME PLAN AGAINST THAT PARTICIPANT'S PENSION BENEFITS.

This case presents the question whether ERISA's anti-alienation provision, 29 U.S.C. section 1056(d)(1), supersedes its enforcement provisions when a trustee who has not satisfied a judgment based upon the breaches of his fiduciary duties to the plan seeks to receive pension benefits from the plan. As set forth below, the Fifth Circuit's decision seriously skews the balance between these provisions, with a potentially devastating impact on the Act as a whole, all contrary to ERISA's language and purposes.

A. ERISA Delegates Broad Powers to Courts to Fashion Appropriate Relief for the Breaches of Fiduciary Duties.

Section 409(a) of ERISA, 29 U.S.C. section 1109(a), provides that a person who breaches his fiduciary duties to a plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Section 502(a) of ERISA, 29 U.S.C. section 1132(a), authorizes any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section 1109" or to obtain an injunction or "other appropriate equitable relief" to remedy a breach of fiduciary duties.

Many courts have recognized that these provisions necessarily provide courts with great latitude to fashion relief against persons who breach their fiduciaries to an ERISA plan. *See, e.g., Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1409-13 (9th Cir. 1988) (imposition of constructive trust despite termination of plan); *Lowen v. Tower Management, Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987) (disregarding corporate form; disgorgement of profits); *Donovan v. Bierwirth*, 754 F.2d 1049, 1055-56 (2d Cir. 1985) (injunctive relief); *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983) (order requiring posting of \$1,000,000 bond), *cert. denied*, 464 U.S. 1040 (1984); *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (appointment of receiver); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) (recision of prohibited transaction).

B. ERISA's Enforcement Provisions Authorize an Offset against an Unfaithful Trustee's Pension Benefits.

In *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied sub nom., Goldstein v. Crawford*, 484 U.S. 943 (1987), the Court of Appeals for the D.C. Circuit found that ERISA's fiduciary and enforcement provisions specifically enabled a plan trustee to offset a judgment based upon a participant's breaches of fiduciary duties to the same plan. In reaching that conclusion, the court relied not only upon ERISA's language, but also upon the common law of trusts incorporated by Congress into its provisions.

The *Crawford* court found that in the absence of an offset, a judgment based upon breaches of fiduciary duties could be unsatisfied and both the plan and its

participants would be deprived of the funds which were wrongfully taken from them. "Rather than to allow such an inequity," the court found, "traditional trust law would clearly support the forfeiture of the beneficial interest of a breaching fiduciary in order to offset the losses suffered by the trust." 815 F.2d at 120. As the court concluded in *Crawford*, ERISA's enforcement provisions authorize an offset of a judgment based upon a trustee's breaches of fiduciary duties against his pension benefits.

C. ERISA's Anti-Alienation Provision Does Not Preclude Offset.

ERISA's anti-alienation provision, 29 U.S.C. section 1056(d)(1), provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." In light of the dictates of ERISA's enforcement terms, this provision does not preclude offset in situations such as the present case, contrary to the Fifth Circuit's finding.

1. Courts Have Adopted, And Congress Has Approved, Other Exceptions to the Anti-Alienation Provision.

The strictures of ERISA's anti-alienation provision are not absolute. As the court found in *Crawford*, many courts have recognized exceptions to the anti-alienation provision, including exceptions for family support and community property obligations contained in divorce decrees. 815 F.2d at 121. Congress approved of these changes and incorporated them into ERISA in the Retirement Equity Act of 1984, now codified at 29 U.S.C. section 1056(d)(3).

2. A Contrary Interpretation Would Defeat ERISA's Purposes.

The exceptions were recognized to provide the flexibility needed to enforce the purposes of the Act. The purpose of the enforcement provisions is to force dishonest trustees to make restitution to the injured plans. Permitting offset would further the purposes of all of ERISA's terms, including its anti-alienation provision, by ensuring that plan assets will only be used for the payment of benefits. In this case for example, Shanbaum has already deprived the Plan, through the breaches of his fiduciary duties, the amount of benefits which the Plan seeks to offset. The relief requested by Petitioner will prevent the Plan from having to pay these benefits twice, and will preserve Plan assets for the rightful beneficiaries. In contrast, to construe ERISA's terms to defeat offset under these circumstances would defeat its purposes by allowing persons to breach their fiduciary duties with impunity.

D. The Decision in *Guidry v. Sheet Metal Workers National Pension Fund* Does Not Preclude Offset.

In declaring that ERISA's anti-alienation provision was absolute, the Fifth Circuit relied upon the decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680 (1990). In that case, this Court found that a pension plan could not offset a judgment which did *not* arise from breaches of fiduciary duties owed to the plan against that person's pension benefits. This Court, however, repeatedly distinguished the situation in which the defendant, as here, had been found to have violated his fiduciary duties to the plan itself, stating that:

We need not decide whether the remedial provisions contained in §409(a) supersede the bar on alienation in §206(d)(1), since petitioner has not been found to have breached any fiduciary duty *to a pension plan*.

110 S. Ct. at 685 (emphasis in original).

Indeed, the Court in *Guidry* cited the opinion in *Crawford*, which had permitted an offset under the same circumstances present in this situation, but did not express any opinion as to its continuing validity. 110 S. Ct. at 684 n.9. *Guidry*, therefore, did not undermine *Crawford*'s validity, but expressly left open the question presented in this case, whether ERISA's anti-alienation provision takes precedence over its own enforcement provisions. ERISA's language, history, and purpose all demonstrate that it does not.

E. This Court Should Grant Certiorari to Resolve a Conflict Between Courts of Appeals, to Address a Question Left Open By Its Previous Decisions, And to Reverse a Decision Which is Contrary to the Statute And Its Purposes.

This Court should grant a writ of certiorari to review the Fifth Circuit's decision. First, that decision is in conflict with the opinion of the D.C. Circuit in *Crawford*. Although the Fifth Circuit attempted to rely upon the intervening decision in *Guidry*, it still recognized that the arguments presented in *Crawford* were "strong," that *Guidry* left the question presented in this case open, and that certain aspects of the *Crawford* court's reasoning remain "untouched" by *Guidry*. 897 F.2d at 803-04.

Second, the issue presented here has not been addressed directly by this Court. This case, in fact, presents the issue the Court expressly left open in *Guidry*. 110 S. Ct. at 685.

Finally, the result reached below is manifestly unfair and contrary to ERISA's purposes. Theodore Shanbaum is avoiding a judgment based upon his breaches of the fiduciary duties he owed to this pension plan. After having improperly used the pension plan assets, Shanbaum should not be permitted to obtain additional benefits at the expense of the participants and beneficiaries whose trust he has broken. Without a right of offset, many pension plans, like this Plan, will be left without any remedy against disloyal fiduciaries.

CONCLUSION

A pension plan should be permitted to offset a judgment based upon a trustee's breaches of his fiduciary duties against pension benefits payable by the plan. The Fifth Circuit's decision precluding such an offset was contrary to ERISA's language, history, and purposes, and contrary to the holdings of other courts considering the same issue. For these reasons, Petitioner respectfully requests review by this Court, reversal of the decision of the Court of Appeals for the Fifth Circuit, and reinstatement of the decision of the District Court below.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR
THE FIFTH CIRCUIT
(Decided April 5, 1990)

No. 89-1493

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

ROY A. HERBERGER, TRUSTEE FOR THE LEE
OPTICAL AND ASSOCIATED COMPANIES
PENSION PLAN TRUST,
Plaintiff-Appellee,

v.

THEODORE SHANBAUM,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas.

Before GOLDBERG, GARWOOD and DAVIS, *Circuit
Judges.*

W. EUGENE DAVIS, *Circuit Judge.*

Theodore Shanbaum (Shanbaum) appeals the district
court's holding that Roy Herberger (Herberger), the
trustee of Shanbaum's pension plan, may offset an
amount Shanbaum owes to the plan against Shanbaum's
monthly pension benefits. We reverse.

I.

Shanbaum, along with Ellis Carp and Glen Auerbach, were the three principal shareholders of Lee Optical, Inc. (Lee Optical). All three served as charter trustees of the Lee Optical Pension Plan (the Pension Plan or the Plan), which was created in 1951. Shanbaum was also a beneficiary of the Plan. He is now seventy-seven years old and draws a monthly pension of \$3,521.87.

Beginning in 1980, the U.S. Secretary of Labor initiated an action against Shanbaum, Carp, Lee Optical, and its subsidiary Dal-Tex, alleging violation of ERISA, 29 U.S.C. §1109(a), in connection with their management of the Pension Plan. In 1981, that action was settled in a Consent Decree that removed Shanbaum as sole-surviving trustee and appointed Oscar Lindemann (Lindemann) as his successor. In addition, the decree ordered the Dal-Tex subsidiary of Lee Optical to pay over one million dollars in outstanding principal and interest owed to the Plan, and held Shanbaum and Carp jointly and severally liable for this sum if Dal-Tex proved unable to pay.

Soon afterward, Dal-Tex defaulted, and the Plan sought to enforce the judgment against Shanbaum and Carp. In satisfaction of this debt, Lindemann accepted Shanbaum's and Carp's interests in SCP, a joint venture owned in equal shares by Shanbaum, Carp and the Plan. Later squabbling over the value of the joint venture's assets, however, resulted in a two million dollar judgment against Lindemann for breach of his fiduciary duty to the Plan. Shanbaum was held jointly liable for this sum as a "knowing and active participant[] in

Lindemann's breach of fiduciary duty." *Whitfield v. Lindemann*, 853 F.2d 1298, 1302 (5th Cir. 1988), cert. denied sub nom, *Klepak v. Dole*, _____ U.S. _____, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989).

Herberger, plaintiff-appellee, was appointed by the court to succeed Lindemann as trustee of the Plan. By this time, Shanbaum had begun receiving his pension payments, which were his only source of income. Unable to otherwise collect the debt, Herberger sought to offset Shanbaum's monthly benefit payment against the judgment rendered against Shanbaum's in *Whitfield*. The district court allowed the offset. On appeal, however, this court noted that the judgment against Shanbaum was not for the breach of a trustee's fiduciary duty; rather, the judgment was for participation in such a breach by a nonfiduciary third party. This court held that the anti-alienation provision of ERISA, 29 U.S.C. §1056(d)(1), prevented the offset and reversed the district court's order. *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988).

During the pendency of this federal litigation, an unrelated lawsuit was filed in Texas state court by W.F. DeTournillon, who had at one time been an employee of the Grayson Company. Shanbaum, Carp and the Plan had been the sole shareholders of Grayson which had been liquidated in 1982. DeTournillon sought to recover salary and bonuses earned while he was an employee of Grayson, and since that corporation was defunct he sued its successors: Shanbaum, Carp's estate, and the Pension Plan.

The Pension Plan settled with deTournillon for \$20,000. In September 1986, the state court awarded the plaintiff a \$168,000 judgment against Shanbaum and Carp's estate, and also awarded the Pension Plan a \$20,000 indemnification judgment against Shanbaum "for the breach of his fiduciary duty as trustee" of the Plan. Again, however, the Pension Plan's judgment against Shanbaum proved uncollectible and again, Herberger sought an order from the federal district court to allow the Plan to offset the outstanding judgment against Shanbaum's monthly pension benefits. The district court entered judgment allowing the offset. Shanbaum now appeals that judgment.

II.

Shanbaum argues that the district court erred in allowing an offset, because doing so violated the anti-alienation provision of ERISA, 29 U.S.C. §1056(d)(1). This provision states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." This court has not previously addressed the question of whether, despite §1056(d)(1), a pension plan may offset a judgment against a former trustee's benefits when the judgment against the former trustee is predicated on a breach of his fiduciary duties.

This court held in *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988), that the general rule created by the anti-alienation provision of §1056(d)(1), prevented an offset to recover a judgment for knowing participation by a nonfiduciary third party in the breach of fiduciary duty by a plan trustee. *See also*, 26 U.S.C. §401(a)(13) (tax code requirement that benefits under a

qualified plan cannot be assigned or alienated). Based on the two statutes cited above and on 29 U.S.C. §1053(a) (providing that an employee's pension benefit is nonforfeitable upon reaching retirement age), the *McLaughlin* court found a "clear congressional intent [that] courts should exercise great restraint in divesting plan beneficiaries of that which Congress decided should be vested." 853 F.2d at 1309. However, the court explicitly reserved the question presented by this case. *Id.*

In *Crawford v. La Boucherie Bernard*, 259 U.S. App. D.C. 2545, 815 F.2d 117, *cert. denied sub nom., Goldstein v. Crawford*, 484 U.S. 943, 108 S.Ct. 328, 98 L.Ed.2d 355 (1987), *reh. denied*, 484 U.S. 1020, 108 S.Ct. 735, 98 L.Ed.2d 683 (1988), the D.C. Circuit did carve out an exception to the general rule against alienation and allowed a judgment, predicated on breach of fiduciary duty by a plan trustee, to be offset against the trustee's pension benefits. The court gave a number of cogent reasons for its decision.

First, the court stated that the purpose of ERISA was to protect the interests of beneficiaries by establishing standards and obligations for fiduciaries and by providing remedies for breaches of such obligations. 29 U.S.C. §1001(b). The court further explained that 29 U.S.C. §1109(a) provided that in addition to liability for losses and restitution of wrongful profits, breaching trustees are "subject to such other equitable or remedial relief as the court may deem appropriate." Similar language is included in 29 U.S.C. §1132(a)(3)(B) which describes the type of relief available in civil actions

brought to enforce the ERISA requirements. The court concluded that provisions within ERISA gave courts broad authority to fashion remedies for redressing breaches.

Second, the *Crawford* court relied on language in ERISA's legislative history to conclude that the objective of ERISA remedial provisions was to "make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger trust assets; and to provide effective remedies for breaches of trust." *Crawford*, 815 F.2d at 120, *citing*, 120 Cong.Rec. S-15737, Aug. 22, 1974, *reprinted in*, 1974 U.S.Code Cong. & Admin. News 4639, 5177, 5186. After concluding that trust law was applicable, the court cited the well established trust principle that when a trustee who is also a beneficiary of the trust breaches his fiduciary duty to the trust, the other beneficiaries can force the trustee to make good his breach out of his beneficial interest in the trust. *Id.*, *citing*, Bogert, *Trusts & Trustees*, §191 at 484 (2d ed. 1979); III *Scott on Trusts* § 257 at 2201 (3d ed. 1967).

Finally, the *Crawford* court addressed the anti-alienation provision directly and found that the general rule against alienability of ERISA benefits was not "immutable." The court explained that the Eleventh Circuit had carved out an exception for liabilities arising from the employee's criminal conduct towards his employer. See *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550, 552 (11th Cir. 1985). In addition, other courts had permitted garnishment of benefits to satisfy family support and community property obligations. See,

e.g., *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers International Union v. Stone*, 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (1981).

Although the *Crawford* decision presents strong arguments for allowing an offset, we decline to follow it, primarily because of the Supreme Court's recent decision in *Guidry v. Sheet Metal Workers National Pension Fund, Inc.*, _____ U.S. _____, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990), which calls the soundness of *Crawford* into question. In *Guidry*, the Court disallowed an offset against an employee's pension benefits where the employee, who did not owe a fiduciary duty to the pension plan, was convicted of embezzling union funds. The court concluded that Congress provided no exception to the ERISA anti-alienation provision that would allow the offset. Specifically, the court stated that the remedial provisions of ERISA did not outweigh the anti-alienation provision and, therefore, did not allow a constructive trust to be imposed in favor of the union.

Although the Court expressly reserved the question of whether an offset would be allowed where the employee's liability was predicated on a breach of fiduciary duty to the plan, the Court's dicta leads us to conclude that an offset should not be allowed. The Court stated that:

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the

context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Id.

The Court's decision in *Guidry* so undermines the *Crawford* reasoning that we decline to follow *Crawford*. First, the *Crawford* court's reliance on ERISA's legislative history to authorize the application of general trust law to create an exception to the anti-alienation provision is no longer persuasive. The Supreme Court found no justification to create an exception to the anti-alienation provision in order to impose a constructive trust on benefits. Also, the holdings in some of the cases relied on by *Crawford* to support the proposition that the anti-alienation provision is not "immutable" were rejected by the Court in *Guidry*. For example, *Guidry* holds that an employee's criminal misconduct cannot be the basis for an offset. This is contrary to the holding in *St. Paul Fire & Marine*, 752 F.2d 550, upon which *Crawford*

relied. In addition, *Guidry* recognized that "qualified domestic relations orders" are not covered by an express statutory anti-alienation exception. *Id.* at n. 18, citing, §104(a) of the Retirement Equity Act of 1984, 98 Stat. 1433, 29 U.S.C. §1056(d)(3) (1982 ed. supp. V). Therefore, the domestic relations cases cited by *Crawford* no longer support the *Crawford* court's decision to create a judicial exception to the anti-alienation provision. To the contrary, the fact that Congress amended the statute to allow this exception lends support to the notion that Congress will create exceptions where it sees fit and courts should not do so.

The only aspect of the *Crawford* reasoning that remains untouched by *Guidry* is the weighing of ERISA's remedial provisions against the anti-alienation provision. In *Guidry*, the Supreme Court held that the civil enforcement provision, 29 U.S.C. §1132(a)(3)(B), which allows a participant, beneficiary, or fiduciary to "obtain other *appropriate equitable relief* (i) to redress . . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan," (emphasis added) was not expansive enough to allow an offset. The *Crawford* court recognized the similarity between the above language contained in §1132(a)(3)(B) and the language contained in 29 U.S.C. §1109(a), the specific provision applicable in *Crawford* and in this case, which allows "equitable or remedial relief as the court may deem appropriate" when a person breaches the fiduciary duties. *Crawford*, 815 F.2d at 119. Based upon *Guidry*'s strict application of the anti-alienation provision, we are persuaded that the Court would not find the language in §1109(a) expansive enough to allow an offset when the Court did not interpret equivalent language in §1132(a)(3)(B) to allow an offset. We conclude, therefore,

that Herberger should not be allowed to offset the *deTournillon* judgment against Shanbaum's pension benefits.

Because of our disposition of this appeal, we need not reach Shanbaum's two other contentions: (1) that the state court had no subject matter jurisdiction over Shanbaum's actions, therefore the state court judgment is void; and (2) that the trustee did not have authority to act on the plan's behalf.

REVERSED and RENDERED.

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**JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

(Filed April 5, 1990)

No. 89-1493

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**ROY A. HERBERGER, TRUSTEE FOR THE LEE
OPTICAL AND ASSOCIATED COMPANIES
PENSION PLAN TRUST,**
Plaintiff-Appellee,

vs.

THEODORE SHANBAUM,
Defendant-Appellant.

D.C. Docket No. CA3-88-2984-F

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

Before GOLDBERG, GARWOOD, and DAVIS, Circuit Judges.

JUDGMENT

**This cause came on to be heard on the record on
appeal and was argued by counsel.**

ON CONSIDERATION WHEREOF, IT is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed and judgment rendered for defendant in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the plaintiff-appellee pay to the defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: April 5, 1990

**ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS**

(Filed May 1, 1989)

Civil Action No. 88-2984-F

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**ROY A. HERBERGER, TRUSTEE FOR THE LEE
OPTICAL AND ASSOCIATED COMPANIES
PENSION PLAN TRUST,**

v.

THEODORE SHANBAUM.

**ORDER DENYING MOTION TO DISMISS
AND GRANTING SUMMARY JUDGMENT**

Before the court are two motions: Defendant's Motion to Dismiss and Plaintiff's Motion for Summary Judgment. Having considered the motions, the responses thereto, and the pertinent authorities, the court finds that:

- (1.) the Motion to Dismiss should be DENIED and that
- (2.) the Motion for Summary Judgment is meritorious and should be GRANTED.

Theodore Shanbaum ("Shanbaum") is a former trustee of the Lee Optical and Associated Companies Pension Plan Trust ("the Plan") as well as a beneficiary

of the Pension Plan and receives monthly benefits in the amount of \$3,521.87. A final judgment was rendered against Shanbaum on September 18, 1986 in the 162nd Judicial District Court of Dallas County, Texas in the amount of \$20,000.00 plus 10% per annum post judgment interest in favor of the Plan.

Plaintiff, Roy A. Herberger, Trustee for the Lee Optical and Associated Companies Pension Plan Trust ("Trustee") filed his Original complaint for Interpleader and Declaratory Relief December 1, 1988 and has interplead Shanbaum's December, 1988 and January, February, March, and April 1989 pension benefits into the registry of this court. Trustee seeks to offset the Final Judgment against Shanbaum's pension benefits in the future until the Final Judgment has been satisfied.

The court has examined the traditional trust principles relied upon by Plaintiff herein and the reasoning and result reached in *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied*, _____ U.S. _____, 108 S.Ct. 328 (1987) (offset appropriate remedy and not precluded by other provisions) and finds that Shanbaum's pension benefits should be offset until such time as the Final Judgment is satisfied. Accordingly, the court will enter a judgment to that effect.

SO ORDERED this 1st day of May, 1989.

/s/ ROBERT W. PORTER
Chief Judge

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**JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS**

(Filed May 1, 1989)

Civil Action No. 88-2984-F

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**ROY A. HERBERGER, TRUSTEE FOR THE LEE
OPTICAL AND ASSOCIATED COMPANIES
PENSION PLAN TRUST,**

v.

THEODORE SHANBAUM.

JUDGMENT

Having considered Plaintiff's for Summary Judgment and the pertinent authorities, the court finds that the Plaintiff is entitled to summary judgment in its favor.

It is therefore ordered that Plaintiff offset Defendant's pension benefits in the amount of \$3,521.87 per month against the Final Judgment rendered against Defendant Shanbaum on September 18, 1986 in the 162nd Judicial District Court of Dallas County, Texas in the amount of \$20,000.00 plus 10% per annum post judgment interest until said Final Judgment is satisfied.

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It is further ordered that the funds interplead into the court's registry to date be paid to Plaintiff toward satisfaction of the Final Judgment.

SO ORDERED this 1st day of May, 1989.

/s/ ROBERT W. PORTER
Chief Judge

